

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 4, 2001 Session

**MELISSA COMBS CRANSTON v. EDWARD SCOTT COMBS**

**Appeal from the Chancery Court for Montgomery County  
No. 95-11-0055 Carol Catalano, Chancellor**

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**No. M2000-02101-COA-R3-CV - Filed January 15, 2002**

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This matter involves only the issue of child custody and a determination of whether there was a material change of circumstances sufficient to alter the previously ordered custody arrangement. We find no such material change of circumstances and reverse the trial court's decision in this regard.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Reversed and Remanded**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., joined. DON R. ASH, SP. J., filed a dissenting opinion.

Steven C. Girsky, Clarksville, Tennessee, for the appellant, Melissa Combs Cranston.

R. Allan Thompson, Clarksville, Tennessee, for the appellee, Edward Scott Combs.

**OPINION**

The parties involved, Melissa Combs Cranston, Plaintiff/Appellant, and Edward Scott Combs, Defendant/Appellee, were divorced in 1996. During the marriage they had two children, a son, Joshua Combs born on January 26, 1986, and a daughter, Sara Combs born on December 11, 1992. The parties were divorced in July of 1996. Mr. Combs made no request for custody, and full custody was awarded to Ms. Cranston with Mr. Combs to have reasonable visitation upon at least 24 hours notice. The parties began having conflicts regarding visitation shortly after the divorce, so in January of 1997, Mr. Combs filed a petition to change custody or obtain a specific visitation plan. They subsequently agreed on a standard visitation plan which was incorporated in an order entered in September of 1997.

Problems with visitation continued, and Mr. Combs filed another petition for change of custody in July of 1999 alleging that he had been denied visitation by Ms. Cranston, that he had been denied appropriate and unmonitored phone calls with the children, and that he was concerned about possible threats of violence against the children.

After a hearing on August 8, 2000, the court determined that there was a material change of circumstances that presented a risk of harm to the parties' minor children from Ms. Cranston's interference with her ex-husband's visitation and that this change of circumstances warranted a change in custody. Mr. Combs was awarded custody and Ms. Cranston was given visitation rights and ordered to pay child support. In explaining its determination, the court stated:

[T]here's no question about what rights the father has to have these children and an opportunity to maintain a relationship with them as is his right, but most importantly their right, their right to be with their father to accomplish and maintain a relationship. And the risk of the loss of that relationship is a material change of circumstance. That risk is of substantial potential harm to the children that they not have this relationship.

If children could properly grow up without parents, then this wouldn't be a problem. But they cannot. The most important relationship a person has from conception till majority is their relationship with their parents

Mr. Combs testified that he would leave messages for his children on the answering machine at the mother's home and come to find they didn't get these messages. He said that Mrs. Cranston would pick up the phone sometimes when he was calling and then hang it up on him. That he knew she was listening on some of their conversations, and that in other - - on another occasion she wouldn't call the children to the phone. Mrs. Cranston admits she refused to call the children to the phone. She knew where they were. She told us precisely where they were, but she didn't call them to the phone.

Mr. Combs testified he was changing his medical insurance coverage, needed the children's Social Security numbers and that the mother, Mrs. Cranston, refused to provide those number. True he didn't explain. But he shouldn't have to. He's the father. And it's that failure to recognize his equal rights as father to have a relationship with these children. That's the problem.

The court went on to cite derogatory comments made about Mr. Combs by Ms. Cranston in front of the children and numerous occasions when Ms. Cranston has refused to talk to Mr. Combs or failed to properly communicate with him. He also cited disciplinary and school problems Ms. Cranston has regarding their son, as well as, the strong willed nature of their daughter and Mr. Combs 'concern' for his daughter's well being, in addition to visitation missed or cut short due to Ms. Cranston allowing or obliging the children to participate in other activities rather than visit their father.

Ms. Cranston presented two issues for review:

1. Whether there was a material change of circumstances that presented a risk of harm to the children that justified a change of custody?

2. Whether the comparative fitness evaluation was improperly applied?

We find no material change of circumstances which would justify a complete change of custody and, thus, reverse the trial court's determination. As such, it is unnecessary to deal with the issue of comparative fitness.

The review of findings of fact made by the trial judge in a civil action are "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). See *Hass v. Knighton*, 676 S.W.2d 554 (Tenn. 1984). Further, "[t]he burden is on the non-custodial parent to prove changed circumstances. . . . 'Changed circumstances' includes any material change of circumstances affecting the welfare of the child, including new factors or changed conditions which could not be anticipated by the custody order." *Blair v. Badenhope*, 940 S.W.2d 575, 576 (Tenn. Ct. App. 1996).

In child custody cases, the law is well established that when a decree awarding custody of children has been entered, that decree is res judicata and is conclusive in a subsequent application to change custody unless some new fact has occurred which has altered the circumstances in a material way so that the welfare of the child requires a change of custody. . . .

A "material change in circumstances" justifying modification of a child custody order may include factors arising after the initial determination or changed conditions that could not be anticipated at the time of the original order. . . .

As this court has previously recognized, there is a strong presumption in favor of the existing custody arrangement. The party seeking to change the existing custody arrangement has the burden of proof to show both that the child's circumstances have materially changed in a way that was not reasonably foreseeable at the time of the original custody decision and that changing the existing custody arrangement will serve the child's best interests.

Under this standard, the primary inquiry is whether there has been a material change in the child's circumstances. Although there is no concrete definition for what constitutes a material change of circumstances, this court has enumerated several factors that should be taken into consideration when determining whether such a change has occurred. In general, the change must occur after the entry of the order sought to be modified and the change cannot be one that was known or reasonably anticipated when the order was entered. In addition, the material change of circumstances must be a change in the child's circumstances, not the circumstances of either or both of the parents. Finally, the change must affect the child's well-being in a material way.

*Hoalcraft v. Smithson*, 19 S.W.3d 822, 828-29 (Tenn. Ct. App. 1999) (citations omitted).

The burden rests with the non-custodial party to prove a material change of circumstances that directly affects the welfare of the child, and we believe that Mr. Combs did not present evidence that would establish a significant, material change of circumstances that presented a threat of harm to the children.

While Ms. Cranston's obstinate failure to communicate with Mr. Combs regarding visitation and the children's activities can be, at best, characterized as childish,<sup>1</sup> Mr. Combs has also demonstrated a lack of willingness to cooperate with his ex-wife, which contributed to the tensions between the parties. Although deplorable, the visitation bickering between the parents is not a material change which presents a threat of substantial harm to the children. Mr. Combs presented little evidence of any harm to his son caused by the actions of Ms. Cranston, and certainly nothing rising to the level of substantial harm. With regard to his daughter, no actual evidence of any harm at all was presented. Thus, the evidence did not rise to the level needed to justify the drastic remedy of change of custody.

The decision of the trial court in this matter is reversed and the case remanded for further proceedings. Costs are assessed equally to the parties.

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WILLIAM B. CAIN, JUDGE

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<sup>1</sup> Where misconduct is held to be insufficient change of circumstance to change custody, the same misconduct may, under proper circumstances, be added to subsequent conduct in order to accumulate an aggregate total of misconduct which could justify change of custody.

*Wall v. Wall*, 907 S.W.2d 829, 832 (Tenn. Ct. App. 1995).